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No. 95-179

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOSE MAYORGA-PEREZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the time an alien spends in the United States in a nonimmigrant status counts toward the "seven consecutive years" of "lawful unrelinquished domicile" required to establish eligibility for discretionary relief under 8 U.S.C. 1182(c) (1988 & Supp. V 1993).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Anwo, In re:	
16 I. & N. Dec. 293 (BIA 1977), petition for review denied, *Anwo* v. *INS*, 607 F.2d 435 (D.C. Cir. 1979)	6
607 F.2d 435 (D.C. Cir. 1979)	8
Avelar-Cruz v. *INS*, 58 F.3d 338 (7th Cir. 1995)	9
Brown v. *INS*, 856 F.2d 728 (5th Cir. 1988)	8
Camacho v. *INS*, 115 S. Ct. 65 (1994)	9
Castellon-Contreras v. *INS*, 45 F.3d 149 (7th Cir. 1995)	9
Castillo-Felix v. *INS*, 601 F.2d 459 (9th Cir. 1979)	3, 7
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	7
Chiravacharadhikul v. *INS*, 645 F.2d 248 (4th Cir.), cert. denied, 454 U.S. 893 (1981)	7
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976)	3
Graham v. *INS*, 998 F.2d 194 (3d Cir. 1993)	8
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	7
Kim, In re, 17 I. & N. Dec. 144 (BIA 1979)	6
Luciano-Vincente v. *INS*, 786 F.2d 706 (5th Cir. 1986)	8
Madrid-Tavarez v. *INS*, 999 F.2d 111 (5th Cir. 1993)	8
Marquez-Medina v. *INS*, 765 F.2d 673 (7th Cir. 1985)	8
McBride v. *INS*, 503 U.S. 959 (1992)	9
Melian v. *INS*, 987 F.2d 1521 (11th Cir. 1993)	8

Cases—Continued: Page

Michelson v. *INS*, 897 F.2d 465 (10th Cir. 1990) 7
Newton, In re, 17 I. & N. Dec. 133 (BIA 1979) 6
Okpala v. *INS*, 114 S. Ct. 1217 (1994) 9
Ortega de Robles v. *INS*, 58 F.3d 1355 (9th Cir. 1995) 9
Power Reactor Dev. Co. v. *International Union of Elec. Workers*, 367 U.S. 396 (1961) 7
Ramirez-Durazo v. *INS*, 794 F.2d 491 (9th Cir. 1986) 8
Reno v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993) 10
S-, In re, 5 I. & N. Dec. 116 (BIA 1953) 6
Silva v. *Bell*, 605 F.2d 978 (7th Cir. 1979) 2
Silva, In re, 16 I. & N. Dec. 26 (BIA 1976) 3
Tapia-Acuna v. *INS*, 640 F.2d 223 (9th Cir. 1981) . 3
Tim Lok v. *INS*:
548 F.2d 37 (2d Cir. 1977) 7
681 F.2d 107 (2d Cir. 1982) 7, 8

Statutes and regulations:

Act of Feb. 5, 1917 (Immigration Act of 1917), ch. 29, § 3, 39 Stat. 878 ..... 5, 6
Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 2
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat 4978:
§ 602, 104 Stat. 5077-5082 2
§ 602(d), 104 Stat. 5082 2
Immigration and Nationality Act of 1952, ch. 477, Tit. II, ch. 2, 66 Stat. 163 5
8 U.S.C. 1182(c) (§ 212(c)) (1988 & Supp. V 1993) 3, 4, 5, 6, 7
8 U.S.C. 1251(a)(2)(B) (Supp. V 1993) 2
8 U.S.C. 1251(a)(11) (1982) 2
8 U.S.C. 1255a(a) 9
8 U.S.C. 1255a(b) 10

Miscellaneous:

Page

S. Rep. No. 1515, 81st Cong., 2d Sess. (1950) 5-6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unreported, but the decision is noted at 50 F.3d 15 (Table). The decision of the Board of Immigration Appeals (Pet. App. A9-A15) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1995. A petition for rehearing was denied on May 1, 1995. Pet. App. A16-A17. The petition for a writ of certiorari was filed on July 31, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Mexico who entered the United States in 1975. Pet. App. A3. On June 2, 1977, he acquired protected status as a result of the litigation that culminated in *Silva* v. *Bell*, 605 F.2d 978 (7th Cir. 1979), which enjoined the Immigration and Naturalization Service (INS) from taking any action to expel certain aliens who were from Western Hemisphere countries. Pet. App. A11, A13 n.2.[1] On June 25, 1983, petitioner became a lawful permanent resident alien. On January 5, 1988, petitioner was convicted of importing more than 50 kilograms of marijuana into the United States. See Certified Administrative Record (A.R.) 137, 219.

2. The INS thereafter charged petitioner with being deportable from the United States under 8 U.S.C. 1251(a)(11) (1982), as an alien convicted of violating a law "relating to the illicit possession of or traffic in narcotic drugs."[2] A.R. 219. Petitioner's deportation

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[1] Between 1968 and 1976, nearly 150,000 Cuban refugees were granted permanent residence pursuant to the Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161, and those Cuban "adjustees" were charged against the Western Hemisphere quota of 120,000 visas per year. See *Silva* v. *Bell*, 605 F.2d at 981. The purpose of the injunctive relief in the *Silva* litigation was to recapture and reissue immigrant visa numbers assigned to Cuban refugees that had been erroneously charged against the Western Hemisphere quota. Pet. App. A13 n.2.

[2] This provision was renumbered by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 602, 104 Stat. 5077-5082, and now appears as 8 U.S.C. 1251(a)(2)(B) (Supp. V 1993). The amendment does not apply to deportation proceedings, such as petitioner's, that were commenced before March 1, 1991. See IMMACT § 602(d), 104 Stat. 5082.

hearing took place on April 4, 1989. A.R. 139. At that hearing, petitioner conceded his deportability, but requested relief from deportation under Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1988 & Supp. V 1993), under which the Attorney General may grant discretionary relief to "[a]liens lawfully admitted for permanent residence * * * [who have] a lawful unrelinquished domicile [in the United States] of seven consecutive years."[3] A.R. 137, 142-143.

Although petitioner had not been a lawful permanent resident for seven years, he contended that he could satisfy the seven-year requirement by relying on his residency in this country before he became a permanent resident, because the INS had unlawfully delayed processing his application for an immigrant visa. Pet. App. A13. The immigration judge rejected that contention and found that petitioner had failed to meet the seven-year requirement. A.R. 137.

3. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. A9-A15. Relying on its consistent practice, and on *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979), the Board held that "the acquisition of lawful domicile * * * for the purpose of

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[3] Although Section 212(c) on its face authorizes the Attorney General only to admit aliens returning to a lawful domicile in this country, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (BIA 1976); see also 16 I. & N. Dec. at 32 (Member Appleman, concurring) (noting that this interpretation of Section 212(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

eligibility under [8 U.S.C. 1182(c) (1988 & Supp. V 1993)] must be subsequent to the date of admission as a lawful permanent resident." Pet. App. A11-A12. The Board also rejected, as not within its jurisdiction, petitioner's claim that the INS should be "equitably estopped" from deporting him because of its alleged misconduct in delaying processing of his visa application. *Id.* at A12-A15.

4. The court of appeals denied a petition for review. Pet. App. A1-A8. Relying on *Castillo-Felix*, the court held that "[s]even years of lawful unrelinquished domicile must be accumulated *after* an alien is admitted for permanent residence." Pet. App. A2-A3. The court also rejected petitioner's claim that the INS should be equitably estopped from denying his eligibility for discretionary relief. The court explained that the "misconduct" on which petitioner relied to assert an estoppel—*i.e.*, the misapplication of the visa quotas that led to the *Silva* litigation—was based on a "good-faith interpretation" of the immigration laws. *Id.* at A6-A7.[4]

ARGUMENT

Petitioner renews his contention that the seven-year period prescribed by Section 212(c) of the INA may commence before the alien becomes a lawful permanent resident of the United States. The court of appeals correctly rejected that claim. Although the Second Circuit has rejected the Board's methodology for calculating the seven-year period under Section 212(c), petitioner would not be entitled to relief under the Second Circuit's decisions, or under the decisions of any other court of appeals. The Court has denied

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[4] Petitioner does not renew his estoppel claim in this Court.

review in other cases raising the same claim, and review likewise is not warranted in this case.

1. The language of the statutory provision, considered in light of the context in which it was enacted and the consistent course of administrative interpretation, supports the decision of the court of appeals. Section 212(c) of the INA provides only that "[a]liens lawfully admitted for permanent residence * * * who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General." 8 U.S.C. 1182(c). The reference to the unrelinquished domicile as "lawful"—following closely on the initial clause, which limits the provision to aliens "lawfully" admitted for permanent residence—strongly suggests that an alien generally can establish the required residency period only by means of a domicile established after the alien is "lawfully admitted for permanent residence."

That reading of Section 212(c) gains support from the circumstances of its enactment. The provision—enacted as part of the INA in 1952, see INA, ch. 477, Tit. II, ch. 2, § 212(c), 66 Stat. 187—replaced the "Seventh Proviso" to Section 3 of the Immigration Act of 1917, which granted similar relief to "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 878. The Senate Report that preceded enactment of the INA made it clear that the purpose of the revised provision was to limit the Attorney General's discretion to grant relief to those aliens "who came in the front door, were inspected, lawfully admitted, established homes here, and remained for 7 years before they got into trouble." S. Rep. No. 1515, 81st Cong., 2d Sess.

382 (1950). To accomplish that purpose, Congress revised the "Seventh Proviso" of the 1917 Act in two ways: (1) by adding the initial clause, which limits eligibility to "[a]liens lawfully admitted for permanent residence"; and (2) by adding the adjective "lawful" to qualify the types of unrelinquished domicile that would qualify for discretionary relief.

The Board considered the interpretation of Section 212(c) shortly after the INA was enacted, in *In re S-*, 5 I. & N. Dec. 116 (BIA 1953). In that case, the Board reviewed the legislative history of the 1952 revision to the Seventh Proviso and concluded:

> [T]his provision of law is available only to those lawfully resident aliens who are returning to an unrelinquished domicile of 7 consecutive years subsequent to a lawful entry. In other words, we construe the section to mean that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence; and that not only the admission must be lawful but that the period of residence must be lawful.

Id. at 118. The Board consistently has adhered to that interpretation. See, *e.g.*, *In re Anwo*, 16 I. & N. Dec. 293 (BIA 1977), petition for review on other ground denied, *Anwo* v. *INS*, 607 F.2d 435 (D.C. Cir. 1979); *In re Newton*, 17 I. & N. Dec. 133 (BIA 1979); *In re Kim*, 17 I. & N. Dec. 144 (BIA 1979).[5] The Board's contem-

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[5] The Board has not, however, adhered to that interpretation in cases arising in the Second Circuit, in deference to the different interpretation adopted by the Second Circuit in the *Tim Lok* litigation, discussed below at pp. 7-8. See *In re Anwo*, 16 I. & N. Dec. at 298.

poraneous and longstanding interpretation is entitled to substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Power Reactor Dev. Co.* v. *International Union of Elec. Workers*, 367 U.S. 396, 408 (1961). Because that interpretation is reasonable, the majority of courts of appeals that have considered the question have sustained the Board's position. See *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979) (following *In re Anwo*); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 250 (4th Cir.) (following *In re S-*), cert. denied, 454 U.S. 893 (1981); *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990).

2. Petitioner correctly notes (Pet. 6-7) that the Second Circuit adopted a different view in *Tim Lok* v. *INS*, 548 F.2d 37 (1977) (*Lok I*). Acknowledging the difficulty of the problem, see *id.* at 38, the *Lok I* court rejected the Board's interpretation and concluded that any unrelinquished domicile that did not violate the immigration laws would satisfy Section 212(c), even if the domicile was established while the alien was not lawfully admitted for permanent residence. See 548 F.2d at 39-41. In a second opinion dealing with Tim Lok's case, however, the Second Circuit substantially limited the import of its decision in *Lok I*. See *Tim Lok* v. *INS*, 681 F.2d 107 (1982) (*Lok II*). The court in *Lok II* explained that an alien can establish domicile in the United States only by "establish[ing] an intent to remain." *Id.* at 109. Furthermore, he can "establish[] a *lawful* domicile only when his intent to remain [is] legal under the immigration laws." *Ibid.* Because Tim Lok's initial presence in the United States was unlawful, he could not establish a lawful

domicile. Accordingly, the Second Circuit denied Tim Lok's petition for review.

The limited reach of the Second Circuit's rule is evident from decisions of other circuits that have recognized the differing approaches and yet, without deciding which interpretation should prevail, have consistently denied petitions for review of Board orders on the theory that nonimmigrant visitors cannot establish a "lawful" domicile. *Graham* v. *INS*, 998 F.2d 194, 195-196 (3d Cir. 1993) (temporary worker); *Madrid-Tavarez* v. *INS*, 999 F.2d 111, 112 (5th Cir. 1993) ("[A]n alien student, by the terms of his student visa, could not lawfully possess an intent to remain in the United States; but if the student did in fact form such an intent, then he was in violation of his visa and was not here lawfully."); *Brown* v. *INS*, 856 F.2d 728, 730-731 (5th Cir. 1988) (student visitor); *Melian* v. *INS*, 987 F.2d 1521, 1524-1525 (11th Cir. 1993) (visitor for pleasure); *Anwo* v. *INS*, 607 F.2d 435, 437-438 (D.C. Cir. 1979); see also *Lok II*, 681 F.2d at 109 n.3 (noting that nonimmigrant students cannot acquire a lawful domicile).

Petitioner, as a beneficiary of the *Silva* litigation, similarly did not acquire a "lawful domicile" in the United States, because the effect of a "*Silva* letter" was not to render the alien's presence in this country *lawful*. On the contrary, "[t]he only 'right' the *Silva* injunction provided was the right to be temporarily free from deportation." *Ramirez-Durazo* v. *INS*, 794 F.2d 491, 498 (9th Cir. 1986); see also *Luciano-Vincente* v. *INS*, 786 F.2d 706, 709 (5th Cir. 1986) (noting that *Silva* letter simply "relieved [alien] from the threat of deportation while the injunction was in force"); *Marquez-Medina* v. *INS*, 765 F.2d 673, 675 n.2 (7th Cir. 1985) ("It is certainly clear that the injunc-

tion was not intended to confer any benefit other than postponing deportation"). Petitioner could not acquire a *lawful* intent to remain indefinitely in the United States—as required under the Second Circuit's approach—until he became a lawful permanent resident in June 1983. Accordingly, petitioner would not have prevailed even in the Second Circuit.

In recent Terms, the Court has denied certiorari in other cases raising a similar claim where the alien would have been ineligible even under the Second Circuit's test. See *Camacho* v. *INS*, 115 S. Ct. 65 (1994); *Okpala* v. *INS*, 114 S. Ct. 1217 (1994); *McBride* v. *INS*, 503 U.S. 959 (1992). There is no reason for a different disposition here.

3. Petitioner is wrong to contend (Pet. 7-8) that the decision below conflicts with *Castellon-Contreras* v. *INS*, 45 F.3d 149 (7th Cir. 1995). That case involved the distinct issue of whether an individual acquired a "lawful domicile" in the United States when he obtained "temporary resident status" under the amnesty provisions of the Immigration Reform and Control Act of 1986 (IRCA). See 8 U.S.C. 1255a(a); see also *Avelar-Cruz* v. *INS*, 58 F.3d 338 (7th Cir. 1995). The Ninth Circuit has distinguished its prior ruling in *Castillo-Felix*, and has agreed with the result reached by *Castellon-Contreras* in the context of the unusual amnesty provisions of IRCA. See *Ortega de Robles* v. *INS*, 58 F.3d 1355, 1360-1361 (9th Cir. 1995). Whatever the merits of *Castellon-Contreras* and *Ortega de Robles*, aliens subject to IRCA were not in the same position as petitioner. Unlike the temporary stay of deportation that a *Silva* letter afforded to petitioner, IRCA accorded the aliens involved a right to remain in the United States with a view to their becoming permanent residents.

See 8 U.S.C. 1255a(b); *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485, 2489-2490 (1993) Because petitioner was never a lawful temporary resident under IRCA, those decisions do not help him and do not counsel in favor of review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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